Supreme Court, U.S.
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No. 96-1359

In The

Supreme Court of the United States

October Term, 1996

CITY OF NEW YORK, *et al.*,

Petitioners,

vs.

ROBERT BERY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct when it held that art is protected by the First Amendment of the United States Constitution to the same extent as written expression?

2. Whether the Court of Appeals was correct in holding that the New York City General Vendors Law created a *de facto* ban on the legal display and sale of the respondents' artistic expression violated the respondents' constitutionally protected rights under the First Amendment to the United States Constitution?

3. Whether the Court of Appeals was correct in holding that the General Vendor's Law violated the respondents' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

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STATEMENT OF THE CASE

Respondents Bery, Harris, Reiss and Pascual, are all artists who have either sold their paintings or desire to sell their paintings and other artwork on the sidewalks of New York City.[1] (A6). Respondent Artists for Creative Expression on the Sidewalks of New York City (hereinafter "ACES") is an unincorporated advocacy group for artists and their supporters, which supports the rights of artists to display and sell their artwork on the streets of New York. (A6).

The individual artists Bery, Harris and Pascual have either been arrested, fined or imprisoned due to the display and sale of their artwork on the sidewalks of New York City. On such occasions the artists have also been subjected to having their art either confiscated, destroyed or harmed. Bery, Harris and Reiss have all attempted to obtain licenses to sell their work. However, they have been unable to obtain a license because none are being granted. Reiss is an artist who is chilled from displaying her artwork. (A28).

Violation of the license requirement is a misdemeanor punishable by fine and/or imprisonment as well as civil penalties, Administrative Code §§ 20-472(a) and (c)(1). If criminally convicted, the violator is subject to a fine of not less than $250 nor more than $1,000 and/or imprisonment of up to three months, Administrative Code § 20-472(a). Further, if found criminally liable the violator may be fined no less than $250 nor more than $1,000 together with a fine of $250 for each day of the unlicensed activity, Administrative Code § 20-472(c)(1). In addition, police officers are authorized to seize the items being sold, and the

1. Numbers in parentheses preceded by the letter "P" refer to pages in the Petition for Writ of Certiorari; "A" refers to pages in the appendix filed with the Petition for Writ of Certiorari; "JA" refer to pages in the Joint Appendix filed in the Court of Appeals.

seized items are subject to forfeiture, Administrative Code §§ 20-468 and 20-472(a). (A7-8).

In response to being arrested, imprisoned or fined and having their art confiscated, destroyed or damaged. These respondents brought a cause of action in the United States District Court for the Southern District of New York. Said cause of action challenged New York City's General Vendor Licensing Law, which requires artists to have a license to sell their artwork on the streets of New York, even though no licenses are available. (JA8). The respondents are unable to obtain licenses because there is a cap of 853 licenses granted. As a result, there is a waiting list of at least 5 years, comprised of between 500-5,000 applicants. (A8-9, A28-29). None of the respondents awaiting licenses will be able to obtain a license in the foreseeable future. Thus the cap creates a *de facto* ban on the ability of artists to sell their own artwork on the sidewalks of the City of New York at any time, in any place, in any manner. (A29).

While there exists the *de facto* ban and punitive regulations for violations of said licensing requirements, including arrest, fines, confiscation of artwork and imprisonment, there are also detailed regulations for *licensed* vendors which clearly outline the regulation of time, place and manner of sale, as well as which streets are prohibited from vendors. (JA36-42). In addition, there are clear restrictions for licensed vendors regarding the placement of vending stands, times of vending, duty of vendors, tax regulations, emergency procedures and other specific time, place, and manner restrictions, all of which have *not* been challenged by the respondents. (A7-8).

The *de facto* ban is based on the arbitrary number 853, making the "prospects of securing a license apparently nonexistent. A fact conceded [by the respondents] at oral argument." (A8-19).

It is conceded that the number of 853 has been fixed since 1979 and that the licensees have the right to renew. (A35). There is at present no way for an artist to legally sell his/her work on the sidewalks of New York without a license.

In opposition to the arbitrary cap of 853 for general vendors there is a bold exception for the vendors of "written matter", Administrative Code § 20-453. (A7). Said exception was adopted on May 11, 1982 by the City Council of New York when they adopted an amendment to the General Vendors Law, stating *inter alia*:

> The council hereby finds and declares that it is consistent with its principles of free speech and freedom of the press to eliminate as many restrictions on the vending of written matter as is consistent with the public health, safety and welfare.

(JA 44).

As a result of said exception, vendors of written material can publically vend written materials, including books on art, baseball cards, comic books and posters. (JA 196-197). While the City Council eliminated the requirement of a license for vendors of written material, they still required that said vendors be regulated under the time, place and manner restrictions.

The Bery respondents are all artists who want to sell their work on the sidewalks. (A28). None of the respondents are represented by a gallery. Other than the sidewalk, the Bery respondents have no other public forum to display and sell their work. Thus the sidewalk display and sale becomes an integral part of the creation, expression and communication of their work. (*Id.*). The artists' inability to display and sell their work bars

the natural flow of the expression from creation to communication. (*Id.*).

The United States Court of Appeals for the Second Circuit reversed the District Court's holding that artwork is not protected under the First Amendment to the United States Constitution. (A11-17). The court held further that the display and sale of artwork was so interrelated as to be one expression. (A22). The court held that the General Vendors Law violated the respondents' rights under either the strict scrutiny or the lesser standard, since it was not narrowly tailored and did not offer alternative public avenues of expression. Finally, the Second Circuit held that the *de facto* ban violated the respondents' rights under the Equal Protection Clause of the Fourteenth Amendment because it provided a different standard for written material as opposed to artistic expression.

REASONS FOR DENYING THE WRIT

The writ should be denied by this Court because the Second Circuit properly applied established law under the First and Fourteenth Amendments to the United States Constitution.

The Court of Appeals was correct in finding that a *de facto* ban on the respondents' artistic expression was within the protection of the First Amendment. Second, it properly held that the petitioners' regulation was not narrowly tailored and left *no* alternative opportunity for said expression.

The decisions of this Court mandate denial of the petition for a writ of certiorari. Petitioners' reliance on *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 554 (1996), as presenting a "direct conflict" with *Bery* must fail. Moreover, petitioners have totally misconstrued binding constitutional case law.

I.

THERE IS NO CONFLICT BETWEEN *ONE WORLD* AND *BERY.*

Petitioners contend that certiorari should be granted because *One World* directly conflicts with the decision below. *One World* and *Bery* do not indicate a split in the Circuits but rather a consistency in the Circuits' *application* of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) standard. In *One World* the Ninth Circuit, applying the *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) standard applicable to "content-neutral" time, place and manner regulations affecting constitutionally protected activities, upheld a statute which excluded the sale of message-bearing T-shirts on the sidewalks of Waikiki.

Initially, unlike the ban under review in *One World*, which encompassed very few exemptions, the flat, *de facto* ban that applies to the vending of original artwork in New York City has effectively barred an entire medium of expression from the public forum (A18-19), rather than the "one narrow form of expression" foreclosed in *One World*, 76 F.3d 1009, 1014. Here, also, the medium of expression — fine art — conveys the personal perspective of its creator, as opposed to a manufactured T-shirt displaying a generic message. The Second Circuit evaluated the General Vendors Law under the lesser standard under *Ward*, but stated that the banning of an entire medium *may* trigger the strict scrutiny standards. (A18). As the Ninth Circuit pointed out, this Court's holding in *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038 (1994), which struck down a statute foreclosing the display of signs on residential property, "rested heavily on the view that the city's ordinance closed off a 'unique and important' mode of expression for which there is 'no practical substitute.' *Id.* at . . . 114 S. Ct. at 2045-46." 76 F.3d at 1015.

Rejecting the T-shirt vendors' contention that the sale of their merchandise — as opposed to the wearing of the shirts — was a "unique mode of expression akin to displaying a sign in front of one's home," the *One World* court stated that the medium of expression in *Ladue* "has a unique effect because it 'provide[s] information about the identity of the "speaker" [which is] an important component of many attempts to persuade.' *Ladue*, . . . 114 S. Ct. at 2046." 76 F.3d at 1015. It is indisputable that the public display and sale of respondents' artistic creations — which certainly provide information about the artists' identity — is a "venerable" and "unique" mode of expression. The rationale at the heart of *One World* would apply with equal force in the instant case.

Petitioners have not contended, as in *One World*, that local merchants have complained of unfair competition and that the vending constitutes a "visual blight." Their sole contention is that the ordinance, as applied to vendors of artwork, promotes New York City's "interests in keeping public streets safe and free of congestion and obstacles." (P18). While this is unquestionably a legitimate concern, the City already controls congestion in its most crowded thoroughfares by enforcing specific time, place, and manner — including size and placement of display — restrictions detailed in the General Vendors Law. (A8, JA150-55). Accordingly, general vendors are precluded from selling their works of art in locations similar to those in Waikiki.

These restrictions, apparently absent from the statute reviewed in *One World*, also apply to those exempt from the licensing requirement, such as vendors of written materials. Significantly, as the *Bery* court found, the record is devoid of *any* evidence "concerning [the City's] need to ensure street safety and lack of congestion that would justify the imposition barring the display and sale of visual art on the City streets." (A19).

Thus, as the court below also found, the General Vendors Law is not "narrowly tailored to serve a significant government purpose" and petitioners must find "a less restrictive alternative." (A18-19).

Respondents also point out that New York City's General Vendors Law imposes licensing requirements on vendors of T-shirts that include written words, and other "similar merchandise". (P12). As the court below found, petitioner's philistinian view of fine art as "mere merchandise" is devoid of any legal, historical or intellectual merit. (A13-15). In any event, vendors of message-bearing T-shirts are not foreclosed from selling their wares in New York City, as they are in Waikiki.

Perhaps the most compelling distinction between the petitioners in *One World* and those in the instant case is that the former have alternative channels of communication to reach their intended audience. The issue in *One World* was the one of T-shirts with written messages to communicate with others the ideas, views and expressions of the plaintiff. The Ninth Circuit found there may be other ways to express (in writing) their opinions. In the case at bar the communication is *artwork*, the unique and specific expression of the artists, and as such to ban the artists is to ban the communication. As the Ninth Circuit found, the T-shirt vendors were not precluded from handing out literature, proselytizing, or soliciting donations, handing out their T-shirts, mingling with tourists, and wearing the T-shirts in public all as alternative avenues to express their ideas, views and opinions.[2] It is obvious that in the case at bar, as the court below found, such alternative channels of communication do not exist for respondents. (A21-22).

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2. The court also found that the petitioners could sell the T-shirts through local retail outlets or by opening their own stores. This *non* public forum alternative is not available to respondents.

For the above reasons, respondents respectfully submit that there is no conflict between the *Bery* decision and that of the Ninth Circuit in *One World*.

II.

THE COURT OF APPEALS CORRECTLY RULED THAT VISUAL ART IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION AND THAT THE EXHIBITION AND VENDING OF ARTWORKS BY ARTISTS, IN PUBLIC FORUMS, IS ALSO FULLY PROTECTED.

There is no doubt that visual art is a fully protected means of expression and communication. Petitioner's attempt to contend otherwise is futile. As demonstrated by the court below, this Court has found that the scope of the First Amendment extends to a variety of artistic modes of expression, such as music (without words), theater, and other forms of entertainment. (*See* A11-13). In *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1985), which involved visual art, the Seventh Circuit recognized that, "the First Amendment has been interpreted to embrace purely artistic as well as political expression. . . ."

Petitioner's reliance on *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970), as establishing that art without political or social messages or thought is worthy of "minimal" constitutional protection, is unavailing, as *Close* was essentially overruled by *Cohen v. California*, 403 U.S. 15, 21 (1971). In any event, the First Circuit's sliding scale approach, with visual art at or near the bottom, contradicts precedents such as *Winters v. New York*, 333 U.S. 507, 510 (1948) (expression merely intended to entertain, rather than instruct or politicize, is fully protected); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501

(1953) (creative arts like film "affect public attitudes in ways 'ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.' "); and *Abood v. Detroit Board of Education*, 431 U.S. 209, 301 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection").

In addition, there is no evidence that the sliding scale approach has been adopted by this Court, in its holdings, as the scope of First Amendment protection has expanded, rather than contracted. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, __ U.S. __, 115 S. Ct. 2338, 2345 (1995) (abstract music, literature, and art, such as the painting of Jackson Pollack, are "unquestionably shielded"), and *Cohen v. California, supra*, 333 U.S. 15, 26 (the "emotive function" of speech "may often be the more important element of the overall message sought to be communicated"). Petitioners' contention that *Piarowski, supra*, "is apparently the only published case that can be read to suggest that the display of visual artwork is, in and of itself, fully protected under the First Amendment" (P22), is fallacious, as established by ample precedent.[3]

3. Respondents also point out that petitioners' reliance on language contained in *Spence v. Washington*, 418 U.S. 405, 409-10 (1974), was taken out of context. As part of its inquiry as to whether or not the appellant's conduct "was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," this Court cited language in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), concerning its rejection of "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." This "limitless variety of conduct" does not apply to artistic expression. As this Court's decisions establish, and the *Bery* court found, "paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection" (A16); courts have not afforded similar protection to other varieties of conduct, such as social dancing and tattooing. (A16-17).

There is also no reason to reject the *Bery* court's well founded conclusion that the sale of art is also protected. (A15-17). As the Second Circuit pointed out, respondents cannot create their art without compensation, and "the street marketing is in fact a part of the message of [their] art." (A16). Respondents' audience exists in the public forum, not in the rarified and exclusive province of the art gallery: "Anyone, not just the wealthy, should be able to view . . . and buy [respondents'] artwork." (A16). In addition, every artist should be afforded the opportunity to communicate with members of the public, particularly those who are not exposed to fine art. Accordingly, the sale of respondents' creations is "inseparably intertwined" with respondents' protected mode of expression.

Finally, while petitioner contends that "it would be nearly impossible" to exempt vendors of artwork because " 'what is art is inherently subjective' " (P23), the court below correctly found that the City has ordinances containing a definition of "artist." Petitioner has also proved capable of deciding precisely what types of "written materials" are exempt from the licensing requirement. (A17, n.6). Finally as the Second Circuit stated:

> . . . simply because the matter does not lend itself to judicial determination does not mean that is it not appropriate for local lawmakers and governmental bodies such as the City to tackle.

(A17).

III.

THE COURT OF APPEALS CORRECTLY RULED THAT THE LICENSED GENERAL VENDORS LAW IS UNCONSTITUTIONAL AS APPLIED TO RESPONDENTS, WHO HAVE BEEN EFFECTIVELY BANNED FROM EXHIBITING AND SELLING THEIR ARTWORKS IN PUBLIC PLACES IN ALL FIVE BOROUGHS OF NEW YORK CITY.

While both respondents and the court below have cause to question the "content-neutrality" of the General Vendors Law because it bans visual expression while "subjecting [written expression] to a more limited form of regulation" (A17), the court found the ordinance unconstitutional even under the more lenient standard of scrutiny applied in *Ward, supra*, 491 U.S. at 791.

Following the *Ward* standard, the General Vendors Law cannot be construed as "narrowly tailored to serve [the] significant governmental interest" of avoiding street congestion and ensuring free and safe passage, because it has effectively banished an entire medium of expression "when more narrowly drawn regulations will suffice." (A18-19). Significantly, as the court below found, petitioner has totally failed to bear its burden to prove that this governmental interest justifies such a sweeping prohibition (A19-20); *see also Turner Broadcasting System, Inc. v. FCC*, __ U.S. __, 114 S. Ct. 2445, 2470 (1994) (citations omitted) (The government bears the burden not simply of " 'position[ing] the existence of the disease sought to be cured,' " but of "demonstrating that the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way"); *Cincinnati v. Discovery Network, Inc.*, __ U.S. __, 113 S. Ct. 1505, 1517 (1993) ("sweeping ban that bars from . . . sidewalks a whole class of constitutionally protected

speech" is not narrowly tailored). As pointed out above, the General Vendors Law contains time, place and manner restrictions addressed solely to the problem of congestion; these restrictions apply to vendors of written materials. (A20).

Petitioner has also totally failed to demonstrate that the ordinance "leave[s] open ample alternative channels of communication," *Ward*, 492 U.S. at 791. In fact, it has tacitly conceded, there are *no* alternative channels of communication in the *public* forum. Petitioner's contention that "respondents remain free to sell their artwork in *private* establishments, from their own *homes*, or on their own *property*" (P25) portrays their miscomprehension of the *Ward* standard. The Second Circuit clearly applied the *Ward* standard in this regard. (A22).

For the above reasons, this Court should recognize that the General Vendors Law is unconstitutional as applied to respondents and deny the petition for a writ of certiorari.

IV.

THE SECOND CIRCUIT CORRECTLY FOUND THAT SINCE ART IS PROTECTED TO THE SAME EXTENT AS WRITTEN EXPRESSION, THE GENERAL VENDORS LAW HAS VIOLATED THE EQUAL PROTECTION RIGHT OF THE RESPONDENTS.

The Second Circuit held that since art was fully protected, the General Vendors Law must be held unconstitutional as violation of the respondents' right under the Equal Protection Clause of the Fourteenth Amendment. The court held that since a distinction is made between the two types of protected expression, the district court was incorrect in dismissing the Equal Protection argument under a rational basis test. (A23).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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